



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 820

[Docket No. EA-RM-16-PRDNA]

RIN 1992-AA52

Procedural Rules for DOE Nuclear Activities

AGENCY: Office of Enterprise Assessments, Office of Enforcement, Office of Nuclear Safety Enforcement, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) is proposing to amend its Procedural Rules for DOE Nuclear Activities to clarify that the Department may assess civil penalties against certain contractors and subcontractors for violations of the prohibition against retaliating against an employee who reports violations of law, mismanagement, waste, abuse, or dangerous/unsafe workplace conditions, among other protected activities, concerning nuclear safety (referred to as “whistleblowers”). Specifically, this proposed rule would clarify that the prohibition against whistleblower retaliation is a DOE Nuclear Safety Requirement to the extent that it concerns nuclear safety. The proposed rule would also explain the circumstances under which DOE would investigate alleged violations of this prohibition. The proposed rule would also delineate which DOE regulations are DOE Nuclear Safety Requirements.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) submitted on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Any comments submitted must identify the NOPR for Procedural Rules for DOE Nuclear Activities and provide docket number EA-RM-16-PRDNA and/or regulatory information number (RIN) 1992-AA52. Comments may be submitted using any of the following methods:

1. Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.
2. Email: part820rulemaking@hq.doe.gov. Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in Microsoft Word, or PDF file format, and avoid the use of special characters or any form of encryption.
3. Postal Mail: EA-10/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1290. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

As a result of potential delays in the receipt and processing of mail sent through the U.S. Postal Service, DOE encourages respondents to submit comments electronically to ensure timely receipt.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section III of this document (Public Participation).

Docket: The docket, which includes Federal Register notices, public meeting attendee lists and transcripts, comments received, and other supporting documents/materials, is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the www.regulations.gov index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure. A link to the docket webpage can be found at: <http://energy.gov/ea/office-enterprise-assessments>. This webpage will contain a link to the docket for this proposed rulemaking on the www.regulations.gov site. The www.regulations.gov webpage contains simple instructions on how to access all documents, including public comments, in the docket. See section III for further information on how to submit comments through www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

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K.C. Michaels, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Ave., SW, Washington, DC 20585-0121. Phone: (202) 586-3430. Email: Kenneth.Michaels@hq.doe.gov.

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I. Authority and Background

Pursuant to the Atomic Energy Act of 1954 (AEA) (42 U.S.C. 2011 et seq.), DOE has issued regulations governing nuclear safety management (at 10 CFR part 830) and occupational radiation protection (at 10 CFR part 835). Section 234A of the AEA (42 U.S.C. 2282a) authorizes DOE to impose civil penalties for violations of these regulations. Specifically, section 234A authorizes civil penalties against contractors, subcontractors, and suppliers that are covered by an indemnification agreement under section 170.d. of the AEA (42 U.S.C. 2210(d)) (commonly known as the Price-Anderson Act) that violate DOE rules, regulations, or orders “related to nuclear safety.” DOE has issued Procedural Rules for DOE Nuclear Activities at 10 CFR part 820 (part 820), which establishes a process for imposing civil penalties under section 234A.

Separate from part 820, DOE has also issued regulations at 10 CFR part 708 (part 708) that prohibit a contractor or subcontractor from retaliating against employees for reporting violations of law, mismanagement, waste, abuse, or dangerous/unsafe workplace conditions, participating in proceedings, or refusing to participate in an activity that may constitute a violation of law or cause a reasonable fear of injury (referred to as “whistleblowers”). These regulations establish an affirmative duty on the part of contractors not to retaliate against whistleblowers; and establish a process for an employee alleging retaliation to file a claim for reinstatement, transfer-preference, back-pay, and legal fees among other forms of relief.

DOE is proposing to amend part 820 to clarify that DOE may impose civil penalties against a contractor or subcontractor for violating the prohibition against whistleblower

retaliation found in part 708, to the extent it concerns nuclear safety. The proposed rule would not alter the existing procedures for imposing civil penalties, but would establish requirements specific to whistleblower retaliation concerning nuclear safety. The proposed rule would also provide, in the text of part 820, a list of all other DOE Nuclear Safety Requirements.

II. Discussion of Proposed Amendment

A. What are DOE Nuclear Safety Requirements and when may DOE impose civil penalties?

The current version of part 820 includes a definition for “DOE Nuclear Safety Requirements,” and it states that DOE has authority to impose civil penalties for violations of any DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations, Compliance Orders issued under subpart C to part 820, and any program, plan, or other provision required to implement one of these rules or orders.¹ The rule does not identify the particular rules and regulations that DOE regards as DOE Nuclear Safety Requirements.

DOE proposes to amend part 820 to update the definition of DOE Nuclear Safety Requirements, to add a new section to part 820, and to amend the guidance in appendix A to part 820—General Statement of Enforcement Policy. In particular, DOE proposes that the following are enforceable DOE Nuclear Safety Requirements to the extent they concern nuclear safety:

10 CFR part 830 (nuclear safety management);

10 CFR part 835 (occupational radiation protection);

10 CFR 820.11 (information accuracy requirements);

Compliance Orders issued pursuant to 10 CFR part 820, subpart C;

10 CFR 708.43 (duty of contractors not to retaliate against whistleblowers).

¹ The use of the word “order” in this context refers to Compliance Orders issued under subpart C to part 820, not to orders issued under the DOE Directives Program.

The lack of a definitive list of regulations included in the definition of DOE nuclear safety requirements in the text of part 820 has led to a question regarding the scope of DOE's authority to issue civil penalties for violations of these regulations, particularly the prohibition against whistleblower retaliation in part 708. To address this question, DOE proposes to amend part 820 to clarify that part 830, part 835, §820.11, Compliance Orders issued pursuant to subpart C to part 820, and §708.43 as it concerns nuclear safety each represent DOE Nuclear Safety Requirements and that DOE may assess civil penalties for violations of these rules. This amendment is consistent with the original intent in promulgating part 820, as evidenced by appendix A of this part, the preambles to previous rulemakings (e.g. 58 FR 43680, 43681 (Aug. 17, 1993)).

DOE considers each of these provisions to be a DOE Nuclear Safety Requirement and has previously exercised enforcement activity on the basis of violations of these regulations. Parts 830 and 835 both have a clear connection to nuclear safety in that each regulation directly and explicitly governs the conduct of persons whose conduct may affect nuclear safety. Further, part 830 states explicitly that the requirements of part 830 are DOE Nuclear Safety Requirements and 10 CFR 830.5 provides that that violations of part 830 may be enforced through civil penalties in accordance with part 820.

Compliance Orders issued pursuant to subpart C to part 820 and §820.11 also have a clear connection to nuclear safety. Subpart C allows the Secretary of Energy to order any person involved in a DOE nuclear activity to remediate a situation that violates or potentially violates the AEA, another statute relating to a DOE nuclear activity, or a DOE Nuclear Safety Requirement. Because the underlying violations would involve nuclear safety, Compliance Orders issued under subpart C govern conduct that relates to and may affect nuclear safety.

Section 820.11 requires that information pertaining to a nuclear activity that is provided to or maintained for inspection by DOE must be complete and accurate in all respects and prohibits any person involved in a nuclear activity from concealing or destroying information concerning a violation of a DOE Nuclear Safety Requirement. If information regarding a nuclear activity is incomplete or inaccurate, this impedes DOE's ability to conclude that a contractor is adhering to proper safety precautions. Likewise, if a person willfully destroys information regarding a safety violation, it becomes less likely that the violation will be rectified.

Section 708.43 establishes an affirmative duty on the part of DOE contractors (including subcontractors) not to retaliate against whistleblowers. Section 708.36 provides various forms of relief to whistleblower employees. Providing this relief is important, but the Department also has a strong interest in preventing whistleblower retaliation and ensuring that workers feel free to raise important safety concerns. DOE and its contractors rely to a significant extent on workers to bring attention to unsafe conditions. If workers witness any retaliation against an employee for raising a potential nuclear safety issue, it may contribute to a chilled work environment in which workers do not feel free to report such issues. Accordingly, §708.43, as it applies to activities at DOE nuclear facilities that concern nuclear safety, constitutes a DOE Nuclear Safety Requirement.

B. What is the effect of administrative and judicial whistleblower proceedings on DOE's enforcement process?

An employee alleging retaliation by a DOE contractor or subcontractor has several different mechanisms to file a claim for relief, including filing a claim pursuant to part 708, with the DOE Office of the Inspector General, with the Department of Labor under 29 CFR part 24,

or in federal or state court. For most of these mechanisms, a contractor employee may seek a “make whole” remedy including reinstatement, transfer-preference, back-pay, and legal fees, among other forms of compensation. DOE considers the imposition of civil penalties for whistleblower retaliation as a complementary process to these proceedings. Relief to contractor employees who have been found to suffer retaliation is important, but DOE also has a separate and strong interest in deterring future whistleblower retaliation in connection with nuclear safety issues. A “make whole” remedy to the employee may not be sufficiently punitive to deter future retaliation against whistleblowers. In these situations, separate enforcement with the possibility of imposing civil penalties would allow DOE to craft a remedy that is specifically designed to address these safety concerns.

As a matter of regulatory concern, DOE recognizes that conducting enforcement proceedings concerning retaliation in parallel with administrative or judicial proceedings may lead to conflicting results. DOE’s current enforcement policy explains that DOE will generally await the completion of an administrative proceeding before deciding whether to take action. DOE proposes to codify this policy into the regulatory text with respect to proceedings before DOE under part 708, the DOE Office of the Inspector General under 41 U.S.C. 4705 or 4712, the Department of Labor under 29 CFR part 24, or a federal or state court. Specifically, DOE proposes that it will not take any action under part 820 with respect to alleged retaliation until after the deadlines have passed for filing a claim under part 708 or 29 CFR part 24—i.e. 180 days after the alleged violation occurs.² If an administrative or judicial proceeding is filed after

² For a part 708 claim, the employee must file within 90 days after the employee knew or reasonably should have known about the alleged retaliation. For a claim under 29 CFR part 24, the employee must file within 180 days of an alleged violation prohibited by section 211 of the Energy Reorganization Act of 1974 (42 U.S.C. 5851). There is a three-year deadline for filing a complaint with the Inspector General

DOE has already initiated any action under part 820, DOE will immediately suspend its activities under part 820 until the issuance of a final decision in the proceeding—including the exhaustion of appeals. In such instances, DOE will not take any action under part 820 until sixty days after a final decision in an administrative or judicial proceeding finds that a retaliation occurred.

DOE proposes that it will generally exercise enforcement discretion that is consistent with the final decision of an agency or court. If a final decision finds that retaliation occurred, DOE will consider whether that retaliation constitutes a violation of §708.43, and if so, whether to take action under part 820. On the other hand, if a final decision finds that no retaliation occurred, DOE will not take any further action under part 820 with respect to the alleged retaliation unless DOE becomes aware of significant new information that was not available in the prior proceeding.

DOE is aware that the various statutory and regulatory prohibitions against whistleblower retaliation are not identical. Section 708.43 prohibits retaliation against an employee who engages in one of a number of specified activities. It is conceivable that a contractor could retaliate against an employee for an action that is not protected under §708.43, but that is protected under a different statutory or regulatory prohibition. Therefore, in the event that a final decision finds that a prohibited retaliation has taken place, DOE will make a determination of whether that retaliation also constitutes a violation of §708.43 before pursuing remedial measures under part 820 against the contractor.

under 41 U.S.C. 4712, but there is no explicit deadline under 41 U.S. C. 4705. Statutes of limitations before federal and state courts vary.

C. What is DOE's enforcement policy regarding whistleblower retaliation?

Section XIII to appendix A to part 820 currently sets forth DOE's Whistleblower Enforcement Policy. As mentioned in this preamble, this appendix is a general statement of policy and is not binding on DOE or its contractors. In addition to codifying DOE's existing policy to await the completion of administrative proceedings, as described in this preamble, DOE also proposes to codify two other statements of the enforcement policy into a new section of part 820 governing whistleblower enforcement. Specifically, DOE proposes to codify paragraphs d and e of section XIII, which provide that DOE may collect information gathered during administrative proceedings and give appropriate weight to that information in DOE's enforcement process, respectively. DOE also proposes to codify paragraph k of section XIII, which provides that the commencement of an administrative or judicial proceeding regarding an alleged retaliation does not prevent DOE from investigating violations of DOE Nuclear Safety Requirements other than §708.43.

Under this NOPR, DOE is also proposing amendments to section XIII of appendix A to conform with the proposed changes to the regulatory text of part 820.

III. Public Participation

DOE will accept comments, data, and information regarding this proposed rule submitted on or before the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule. Please refer to specific proposed rule provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy marked “confidential,” and one copy marked “non-confidential” with the information believed to be confidential deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11. Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE has determined that this rulemaking does not raise the kinds of substantial issues or impacts that, pursuant to 42 U.S.C. 7191, would require DOE to provide an opportunity for oral presentation of views, data and arguments. Therefore, DOE has not scheduled a public hearing on these proposed amendments to part 820.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This notice of proposed rulemaking has been determined not to be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993). Accordingly, this notice of proposed rulemaking was not subject to review by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website (<http://energy.gov/gc/office-general-counsel>).

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed rule would amend DOE’s Procedural Rules for DOE Nuclear Activities to clarify that DOE may assess civil penalties against certain contractors and subcontractors for violations of the prohibition against retaliating against whistleblowers. While the amended part 820 would expose small entities that are contractors and subcontractors to potential liability for civil penalties, DOE does not expect that a substantial number of these entities will violate a DOE Nuclear Safety Requirement

resulting in the imposition of a civil penalty. On this basis, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

C. Paperwork Reduction Act

This proposed rule would not impose new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

D. National Environmental Policy Act

DOE has determined that this proposed rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemaking that interprets or amends an existing rule or regulation without changing the environmental effect of the rule or regulation that is being amended. The proposed rule would amend DOE's regulations on civil penalties with respect to certain DOE contractors and subcontractors in order to clarify that civil penalties are available for violations of the prohibition against whistleblower retaliation found in §708.43 that concern nuclear safety. These proposed amendments are procedural and would not change the environmental effect of part 820. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires each Federal agency, to the extent permitted by law, to prepare a detailed assessment of the

effects of any Federal mandate in an agency rule that may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. 2 U.S.C. 1532. While the proposed rule may expose DOE contractors and subcontractors to potential liability for civil penalties for retaliating against a whistleblower in connection with a protected activity relating to nuclear safety, DOE does not expect that these civil penalties will approach \$100 million in any single year. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999, 5 U.S.C. 601 note, requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family wellbeing. While this proposed rule would apply to individuals who may be members of a family, the rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and

the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516 note, provides for agencies to review most disseminations of information to the public under

guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this notice of proposed rulemaking under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA) a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action has been determined to not be a significant regulatory action, and it would not have an adverse effect on the supply, distribution, or use of energy. Thus, this action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Approval of the Office of the Secretary

The Secretary of Energy has approved the publication of this proposed rule.

List of Subjects in 10 CFR Part 820

Administrative practice and procedure, Enforcement, Government contracts, Nuclear safety, Penalties, Whistleblowing.

Issued in Washington, DC, on August 5, 2016

Glenn S. Podonsky,
Director, Office of Enterprise Assessments

For the reasons stated in the preamble, DOE hereby proposes to amend part 820 of chapter III of title 10 of the Code of Federal Regulations as set forth below:

PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

1. The authority citation for part 820 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

2. Section 820.2 is amended by revising the definition for “DOE Nuclear Safety Requirements” to read as follows:

§ 820.2 Definitions.

* * * * *

DOE Nuclear Safety Requirements means the set of rules, regulations, orders, and other requirements relating to nuclear safety adopted by DOE to govern the conduct of persons in connection with any DOE nuclear activity and includes any program, plan, or other provision required to implement these rules, regulations, orders, or other requirements. DOE Nuclear Safety Requirements include the following, to the extent that subject activities concern nuclear safety:

- (i) 10 CFR part 830;
- (ii) 10 CFR part 835;
- (iii) 10 CFR 820.11;
- (iv) Compliance Orders issued pursuant to 10 CFR part 820, subpart C; and
- (v) 10 CFR 708.43.

* * * * *

3. Section 820.14 is added to subpart A to read as follows:

§ 820.14 Whistleblower protection.

(a) Covered acts. An act of retaliation (as defined in 10 CFR 708.2) by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c) may constitute a violation of a DOE Nuclear Safety Requirement if it concerns nuclear safety.

(b) Commencement of investigation. The Director may not initiate an investigation or take any other action under this part with respect to an alleged act of retaliation by a DOE contractor until 180 days after an alleged violation of 10 CFR 708.43 occurs.

(c) Administrative or judicial proceedings. The Director shall immediately suspend any ongoing activities under this part and suspend any time limits under this part when an administrative or judicial proceeding commences based on the same alleged act of retaliation. While an administrative or judicial proceeding, including appeals, is pending, the Director may not exercise any authority under this part based on an alleged violation of 10 CFR 708.43, including issuing enforcement letters, subpoenas, orders to compel attendance, Consent Orders, Preliminary Notices of Violation, or Final Notices of Violation. Once such a proceeding commences, the Director shall not conduct any activities under this part until sixty days after a final decision of an agency or court finds that a retaliation occurred.

(d) Final decision. For the purposes of this section, a final decision of an agency or court includes any of the following:

- (1) A final agency decision pursuant to 10 CFR part 708;
- (2) A final decision or order of the Secretary of Labor pursuant to 29 CFR part 24;
- (3) A decision by the Secretary upon a report by the Inspector General;
- (4) A decision by a federal or state court.

(e) Evidentiary record. If a final decision of an agency or court finds that retaliation occurred, the Director may obtain and use information collected as part of those proceedings. The Director has discretion to give appropriate weight to information obtained from these proceedings and to initiate and conduct further investigation if the Director deems necessary, particularly with regard to the relationship between the retaliation and nuclear safety.

(f) Underlying nuclear safety requirements. Notwithstanding the commencement of an administrative or judicial proceeding based on an alleged act of retaliation, this section shall not prevent the Director from taking any action consistent with this part regarding compliance with DOE Nuclear Safety Requirements other than 10 CFR 708.43.

4. Section 820.20 is amended by revising paragraphs (a) and (b) to read as follows:

§ 820.20 Purpose and scope.

(a) Purpose. This subpart establishes the procedures for investigating the nature and extent of violations of DOE Nuclear Safety Requirements, for determining whether a violation of DOE Nuclear Safety Requirements has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) Basis for civil penalties. DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C.

2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of a DOE Nuclear Safety Requirement.

* * * * *

5. Appendix A to part 820 is amended by revising section XIII to read as follows:

Appendix A to Part 820—General Statement of Enforcement Policy

* * * * *

XIII. Whistleblower Enforcement Policy

a. DOE contractors may not retaliate against any employee because the employee has taken any actions listed in 10 CFR 708.5(a) through(c), including disclosing information, participating in proceedings, or refusing to participate in certain activities. DOE contractor employees may seek relief for allegations of retaliation through one of several mechanisms, including filing a complaint with DOE pursuant to 10 CFR part 708 (part 708), the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24, or the DOE Inspector General (IG).

b. An act of retaliation by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c), may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 if it concerns nuclear safety. To avoid the potential for inconsistency with one of the mechanisms available to an aggrieved DOE contractor employee alleging retaliation referenced in section XIII.a, the Director will not take any action under this part with respect to an alleged violation of

10 CFR 708.43 until a request for relief under one of these mechanisms, if any, has been fully adjudicated, including appeals. With respect to an alleged retaliation, the Director will generally only take action that is consistent with the findings of a final decision of an agency or court. If a final decision finds that retaliation occurred, the Department will consider whether that retaliation constitutes a violation of §708.43, and if so, whether to take action under part 820. If a final decision finds that no retaliation occurred, the Director will generally not take any action under part 820 with respect to the alleged retaliation absent significant new information that was not available in the prior proceeding.

c. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will take into account the extent to which a contractor cooperated in proceedings for remedial relief.

d. In considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

e. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of part 820 and not pursuant to the procedures of part 708.

[FR Doc. 2016-19103 Filed: 8/11/2016 8:45 am; Publication Date: 8/12/2016]